

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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CIRO CAMACHO,

Case No. 3:23-cv-00001-MMD-CSD

Petitioner,

ORDER

v.

TIM GARRETT, *et al.*,

Respondents.

Petitioner Ciro Camacho, a Nevada prisoner, has filed a counseled First-Amended Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254. (ECF No. 12 (“First-Amended Petition”).) Currently before the Court is Respondents’ motion to dismiss the First-Amended Petition. (ECF No. 16 (“Motion”).) Camacho opposed the Motion, and Respondents replied. (ECF Nos. 21, 24.) In Respondents’ Motion, they argue, in part, that ground 1(b)(3) is unexhausted or, alternatively, is technically exhausted but procedurally defaulted. (ECF No. 16.) In their reply, Respondents explain that they inadvertently labeled ground 1(b)(2) as ground 1(b)(3) in their motion to dismiss. (ECF No. 24 at 5 n.1.) Given this issue, this Court ordered Camacho to file a surreply. (ECF No. 25.) Camacho timely complied. (ECF No. 26.) As further discussed below, the Court denies the Motion.

**I. PROCEDURAL HISTORY**

On August 30, 2017, Camacho was indicated on 5 counts of sexual assault of a child under the age of 14 years, 2 counts of using a minor in the production of pornography, and 4 counts of sexual assault of a child under the age of 14 years. (ECF No. 17-2.) Camacho entered a plea agreement, agreeing to plead guilty to 1 count of sexual assault of a child under the age of 14 years and 2 counts of using a minor in the

1 production of pornography in return for the state dismissing the remaining charges. (ECF  
2 No. 17-22.) Camacho was sentenced to an aggregate term of 55 years to life. (*Id.*)  
3 Camacho appealed, and the Nevada Court of Appeals affirmed. (ECF No. 17-39.)

4 Camacho petitioned the state court for post-conviction relief. (ECF No. 17-46.) The  
5 state court denied Camacho's petition. (ECF No. 18-12.) Camacho appealed, and the  
6 Nevada Supreme Court affirmed. (ECF No. 18-27.)

7 Camacho commenced this federal habeas action on or about January 3, 2023.  
8 (ECF No. 1.) This Court granted Camacho's motion for the appointment of counsel and  
9 appointed the Federal Public Defender to represent Camacho. (ECF Nos. 3, 9.) Camacho  
10 raises the following grounds for relief in his First-Amended Petition:

- 11 1(a). His trial counsel failed to move to suppress illegally obtained  
evidence.
- 12 1(b). His trial counsel failed to move to dismiss the indictment based on  
13 (1) the state's evidence being illegally obtained, (2) false testimony  
at the grand jury, (3) improper notice of the grand jury proceedings,  
14 and (4) the grand jury not being sworn in.
- 15 1(c). His trial counsel failed to object to the admission of exhibits at  
sentencing.
- 16 2. The cumulative prejudicial effect of grounds 1(a) and 1(b).

(ECF No. 12.)

## 17 **II. LEGAL STANDARDS & ANALYSIS**

18 Respondents argue that: (1) ground 1(b)(2) and 1(c) are unexhausted or,  
19 alternatively, are technically exhausted but procedurally defaulted; and (2) grounds 1(a),  
20 1(b)(1), 1(b)(2), 1(b)(3), and 2 are barred by *Tollett v. Henderson*. (ECF No. 16.) The  
21 Court addresses these arguments in turn.

### 22 **A. Exhaustion and Procedural Default**

#### 23 **1. Exhaustion legal standard**

24 A state prisoner must exhaust state court remedies on a habeas claim before  
25 presenting that claim to the federal courts. See 28 U.S.C.  
26 § 2254(b)(1)(A). This exhaustion requirement ensures that the state courts, as a matter  
27 of comity, will have the first opportunity to address and correct alleged violations of federal  
28 constitutional guarantees. See *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). "A

petitioner has exhausted his federal claims when he has fully and fairly presented them to the state courts.” *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014). To present a claim, a petitioner must present the substance of his claim fully and fairly to the state courts, and the claim presented to the state courts must be the substantial equivalent of the claim presented to federal court. See *Picard v. Connor*, 404 U.S. 270, 278 (1971). The state courts have been afforded a sufficient opportunity to hear an issue when a petitioner has presented the state court with the issue’s factual and legal basis. See *Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir. 1999). A petitioner may reformulate his claims so long as the substance of his argument remains the same. *Picard*, 404 U.S. at 277-78.

## 2. Procedural default legal standard

Federal courts are barred from considering a state prisoner’s habeas claim if the state courts denied the claim based on an independent and adequate state procedural rule. See *Edwards v. Carpenter*, 529 U.S. 446, 454-55 (2000). “The Ninth Circuit has elaborated that a state rule must be clear, consistently applied, and well-established at the time of the petitioner’s purported default.” *Collier v. Bayer*, 408 F.3d 1279, 1284 (9th Cir. 2005) (internal quotation marks omitted). When a prisoner “procedurally defaults” a federal claim, judicial review is barred unless he can show either: (1) “cause for the default and actual prejudice as a result of the alleged violation of federal law,” or (2) “that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman*, 501 U.S. at 750. To demonstrate cause, a petitioner must show that some external and objective factor impeded his efforts to comply with the state’s procedural rule. See *Maples v. Thomas*, 565 U.S. 266, 280-81 (2012). To show prejudice, a petitioner bears the burden of showing not merely that the error created a possibility of prejudice, but that the error worked to his actual and substantial disadvantage, infecting the entire proceeding with constitutional error. See *Murray v. Carrier*, 477 U.S. 478, 494 (1986).

## 3. Ground 1(b)(2)

Respondents argue that ground 1(b)(2) is unexhausted. (ECF No. 24 at 5.) Camacho rebuts that ground 1(b)(2) is exhausted because the Nevada Supreme Court

1 decided it on the merits. (ECF No. 26 at 3.) As a reminder, in ground 1(b)(2), Camacho  
 2 alleges that his trial counsel failed to move to dismiss the indictment based on false  
 3 testimony at the grand jury proceeding. (ECF No. 12 at 22.)

4 In his opening brief to the Nevada Court of Appeals appealing the denial of his  
 5 state post-conviction petition, Camacho argued that his “trial counsel failed to move to  
 6 dismiss the indictment,” explaining that “[t]he alleged basis for dismissal was the failure  
 7 to serve notice of the grand jury, swear in the grand jury, or that the grand jury indictment  
 8 was based on illegally obtained evidence.” (ECF No. 13-10 at 28.) These three bases  
 9 correspond to grounds 1(b)(3), 1(b)(4), and 1(b)(1), respectively, of the First-Amended  
 10 Petition. Notably, ground 1(b)(2) of the First-Amended Petition was not included as one  
 11 of these bases. Camacho alleges that ground 1(b)(2) was also presented to the Nevada  
 12 Court of Appeals, arguing that he stated the following within his discussion about his trial  
 13 counsel’s failure to move to dismiss the indictment:

14 Camacho’s other contents are duplicative of his due process claims, which  
 15 are discussed in more detail below. As a result, whether counsel was  
 16 effective is intertwined with the merits of those claims. *Incorporating the*  
*arguments below*, prejudice is shown in that a motion to dismiss based on  
 those arguments probably would have been granted.

17 (ECF No. 13-10 at 29 (emphasis added).) Regarding “the arguments below,” Camacho  
 18 argued that the state court erred in finding that he failed to demonstrate cause and  
 19 prejudice to overcome procedural bars. (*Id.* at 31.) Included within his cause and prejudice  
 20 argument, Camacho alleged the following due process claim: “the grand jury relied on  
 21 ‘perjured’ testimony by the officer who examined Camacho’s phone.” (*Id.* at 35.) Camacho  
 22 then asserted that “[h]ad this issue been raised on direct appeal, *or by trial counsel (as*  
 23 *discussed above)*, it would have had a reasonable probability of success.” (*Id.* (emphasis  
 24 added).)

25 Unlike grounds 1(b)(1), 1(b)(3), and 1(b)(4), Camacho did not specifically include  
 26 ground 1(b)(2) within his ineffective assistance of trial counsel claim in his opening brief  
 27 to the Nevada Court of Appeals. However, he incorporated ground 1(b)(2) into his  
 28 ineffective assistance of trial counsel claim at the beginning of his opening brief to the

1 Nevada Court of Appeals, and he provided the factual support for ground 1(b)(2) later in  
2 his opening brief in his discussion about cause and prejudice. Accordingly, this Court  
3 finds that Camacho fully and fairly presented ground 1(b)(2) to the Nevada Court of  
4 Appeals, so it is exhausted.

#### 5 **4. Ground 1(c)**

6 Camacho admits that ground 1(c) is unexhausted, but he submits that it is  
7 technically exhausted and procedurally defaulted and that he can overcome the default  
8 under *Martinez v. Ryan*, 566 U.S. 1 (2012). (ECF No. 21 at 6.)

9 A claim may be considered procedurally defaulted if “it is clear that the state court  
10 would hold the claim procedurally barred.” *Sandgathe v. Maass*, 314 F.3d 371, 376 (9th  
11 Cir. 2002). Camacho would face several procedural bars if he were to return to state court.  
12 See, e.g., NRS §§ 34.726, 34.810. Nevada has cause and prejudice and fundamental  
13 miscarriage of justice exceptions to its procedural bars, which are substantially the same  
14 as the federal standards. If a petitioner has a potentially viable cause-and-prejudice or  
15 actual-innocence argument under the substantially similar federal and state standards,  
16 then that petitioner cannot establish that “it is clear that the state court would hold the  
17 claim procedurally barred.” *Sandgathe*, 314 F.3d at 376. For that reason, this Court has  
18 generally declined to find a claim subject to anticipatory procedural default unless the  
19 petitioner represents that he would be unable to establish cause and prejudice in a return  
20 to state court. In such a case, the claim would generally be subject to immediate dismissal  
21 as procedurally defaulted because the petitioner would have conceded that he has no  
22 grounds for exception to the procedural default in federal court.

23 A different situation is presented, however, where the Nevada state courts do not  
24 recognize a potential basis to overcome the procedural default arising from the violation  
25 of a state procedural rule that is recognized under federal law. In *Martinez v. Ryan*, the  
26 Supreme Court held that the absence or inadequate assistance of counsel in an initial-  
27 review collateral proceeding may be relied upon to establish cause excusing the  
28 procedural default of a claim of ineffective assistance of trial counsel. See 566 U.S. 1, 9

1 (2012). The Nevada Supreme Court does not recognize *Martinez* as cause to overcome  
2 a state procedural bar under Nevada state law. See *Brown v. McDaniel*, 331 P.3d 867,  
3 875 (Nev. 2014). Thus, a Nevada habeas petitioner who relies upon *Martinez*—and only  
4 *Martinez*—as a basis for overcoming a state procedural bar on an unexhausted claim can  
5 successfully argue that the state courts would hold the claim procedurally barred but that  
6 he nonetheless has a potentially viable cause-and-prejudice argument under federal law  
7 that would not be recognized by the state courts when applying the state procedural bars.

8 Here, Camacho advances only *Martinez* as a basis for excusing the anticipatory  
9 default of ground 1(c). (See ECF No. 21.) Accordingly, this Court considers ground 1(c)  
10 technically exhausted and procedurally defaulted. Because the cause and prejudice  
11 questions of overcoming the procedural default of ground 1(c) are necessarily intertwined  
12 with the merits of ground 1(c), this Court will defer a determination of whether Camacho  
13 can overcome the procedural default of ground 1(c) until the time of merits determination.

14 **B. *Tollett v. Henderson***

15 Respondents argue that grounds 1(a), 1(b)(1), 1(b)(2), 1(b)(3), and 2 are barred  
16 by *Tollett v. Henderson*. (ECF No. 16 at 8.) In *Tollett v. Henderson*, the United States  
17 Supreme Court stated: “When a criminal defendant has solemnly admitted in open court  
18 that he is in fact guilty of the offense with which he is charged, he may not thereafter raise  
19 independent claims relating to the deprivation of constitutional rights that occurred prior  
20 to the entry of the plea.” 411 U.S. 258, 267 (1973). However, in examining the holding in  
21 *Tollett*, the Court of Appeals for the Ninth Circuit held that “claims of pre-plea ineffective  
22 assistance of counsel are cognizable on federal habeas review when the action, or  
23 inaction, of counsel prevents petitioner from making an informed choice whether to  
24 plead.” *Mahrt v. Beard*, 849 F. 3d 1164, 1170 (9th Cir. 2017). Because grounds 1(a),  
25 1(b)(1), 1(b)(2), 1(b)(3), and 2 are all ineffective assistance of counsel claims, *Tollett* does  
26 not preclude them.

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### III. CONCLUSION

It is therefore ordered that Respondents' Motion (ECF No. 16) is denied as follows:

(1) ground 1(b)(2) is exhausted, (2) ground 1(c) is technically exhausted and procedurally defaulted, and (3) grounds 1(a), 1(b)(1), 1(b)(2), 1(b)(3), and 2 are not barred by *Tollett*.

This Court defers consideration of whether Camacho can demonstrate cause and prejudice under *Martinez* to overcome the procedural default of ground 1(c) until after the filing of an answer and reply in this action.

It is further ordered that Respondents must file an answer to the First-Amended Petition within 60 days of the date of entry of this order. Camacho will then have 30 days from service of the answer within which to file a reply.

DATED THIS 11<sup>th</sup> Day of March 2024.

MIRANDA M. DU  
CHIEF UNITED STATES DISTRICT JUDGE